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No. 97-6146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANGEL J. MONGE,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should *Bullington* v. *Missouri* be overruled?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

Swift and sure punishment is an essential feature of any worthwhile criminal justice system. *Bullington* v. *Missouri*, by needlessly importing double jeopardy concepts into sentencing hearings, makes the sentence process needlessly complex and too

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

prone to giving windfalls to guilty defendants. This undermining of the criminal justice system is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant was charged in Los Angeles County Superior Court with using a minor to sell marijuana, Cal. Health & Safety Code § 11361(a) (West 1991), sale or transportation of marijuana, § 11360(a), and possession of marijuana for sale, § 11359. *People* v. *Monge*, 16 Cal. 4th 826, 830, 941 P. 2d 1121, 1123 (1997). The People also alleged that defendant had a prior serious felony conviction, Cal. Penal Code § 245(a)(1) (West 1988), assault with a deadly weapon, under California's "Three Strikes" law, §§ 667(b)-(i), 1170.12(a)-(d) (West Supp. 1998). *Monge*, 16 Cal. 4th, at 830, 941 P. 2d, at 1123-1124. Defendant waived his right to a jury trial on the prior conviction and prior prison term allegations, and the trial court granted his motion to bifurcate the determination of those allegations. A jury found defendant guilty of the underlying offenses. The trial court tried the prior serious felony allegation, finding that defendant had previously been convicted of a serious felony. *Id.*, at 831, 941 P. 2d, at 1124.

The Court of Appeal affirmed the convictions but reversed the prior serious felony allegation, finding insufficient evidence to establish that defendant acted personally. *Ibid.* The appellate court further held that double jeopardy barred retrial of the prior serious felony allegation. The California Supreme Court reversed the double jeopardy finding. See *id.*, at 845, 941 P. 2d, at 1134 (plurality); *id.*, at 847, 941 P. 2d, at 1134 (Brown, J., concurring).

SUMMARY OF ARGUMENT

Stare decisis does not preclude a re-examination of *Bullington* v. *Missouri*. That case contradicts prior precedents without overruling them. This creates confusion and disrespect for precedent, contrary to the interests *stare decisis* seeks to protect. Because *Bullington* is a constitutional decision, it must be afforded less protection under *stare decisis*. As *Bullington* has

also been compromised by *Poland* v. *Arizona*, it should be re-examined.

Bullington should be overruled. It is contrary to both the history of the Double Jeopardy Clause and this Court's interpretation of it. By focusing on the procedure involved rather than the hearing's consequences to defendant, *Bullington* is contrary to the principles of the Double Jeopardy Clause. Finally, as it punishes states for expanding protections to defendants, *Bullington* improperly discourages state experimentation in criminal procedure.

ARGUMENT

I. The present case is an appropriate vehicle to examine *Bullington*'s validity.

In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court created an unprecedented, open-ended break with its Double Jeopardy Clause jurisprudence. *Bullington* is an improper expansion of the defendant's Double Jeopardy rights which does not deserve the protection of *stare decisis*, see part II, *post*, and should be overruled. See part III, *post*.

This Court should not protect *Bullington* by creating a "death is different" shield around the decision. The few instances where this Court discriminates between capital and noncapital cases have come under the Eighth Amendment. See, *e.g.*, *Murray* v. *Giarratano*, 492 U. S. 1, 8-9 (1989). The problems with this Court's "annually improvised Eighth Amendment, 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), are considerable. See, *e.g.*, *Walton* v. *Arizona*, 497 U. S. 639, 661-669 (1990) (Scalia, J., concurring in part and concurring in the judgment) (describing results of inconsistency between the requirements of the *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*) and *Lockett* v. *Ohio*, 438 U. S. 586 (1978) lines of cases). They should not be imported into the rest of the Constitution.

If capital cases are to be treated differently under the Constitution, the difference should remain within the Eighth Amendment. Its text implicitly distinguishes between types of punishment—the

impermissible "cruel and unusual" punishments and the constitutional rest. The Double Jeopardy Clause makes no such distinction. It indiscriminately proscribes making any "person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5.[2] In *Stroud* v. *United States*, 251 U. S. 15 (1919), this Court declined to distinguish for the purpose of double jeopardy between a life sentence imposed at the defendant's first trial and the death sentence at his second. See *id.*, at 18. *Stroud* remains good law.[3]

Bullington did not turn on any "death is different" argument, instead relying primarily upon a "hallmarks of the trial on guilt or innocence" standard. See 451 U. S., at 439. The one extension of *Bullington* invoked a similar indiscriminate standard. *Arizona* v. *Rumsey*, 467 U. S. 203, 209 (1984) (extending *Bullington* to Arizona capital procedures "that make [the sentencing proceeding] resemble a trial"). Any attempt to shield *Bullington* through the death penalty is a feeble, post hoc rationalization. *Bullington* should stand or fall on its own merits. As *amicus* will demonstrate, *Bullington*'s meager merits cannot support its repudiation of precedent or destructive effects.

II. *Stare decisis* does not prevent *Bullington* from being overturned.

In *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984), this Court declined to overrule *Bullington* v. *Missouri*, 451 U. S. 430 (1981), a case it had "decided only three years ago." *Amicus* submits that it is now time for a re-examination of *Bullington*. The perspective of time, this Court's retreat from *Bullington* two years later in *Poland* v. *Arizona*, 476 U. S. 147 (1986), and *Bullington*'s

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2. Although read literally, the clause would not apply to imprisonment, double jeopardy has always been understood to apply to any criminal sanction. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 170 (1874).

3. *Bullington* did not overrule *Stroud*, but instead distinguished it because the sentencing procedure employed in *Stroud* was less sophisticated than the one before the *Bullington* Court. See 451 U. S. , at 439, n. 11. This distinction is untenable. See *post*, at 8.

possible spread outside the death penalty provide ample reasons for its re-examination.

A. The Limits of Stare Decisis.

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The judiciary's role in our society is as an interpreter of laws. See The Federalist No. 78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the servant, not the master, of the law.

This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . . ." *Hertz* v. *Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is only because usually "it is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Therefore, this Court has "treated *stare decisis* as a 'principle of policy,' *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), and not as an 'inexorable command.' " *Seminole Tribe of Florida* v. *Florida*, 517 U. S. 44, 63 (1996) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991)).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989).

Constitutional cases are another matter. Because " 'correction through legislative action is practically impossible,' " constitutional cases are more prone to re-examination than statutory cases. *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)); cf. *Patterson*, *supra*, 491 U. S., at 172-173. Given the necessary tension between our democratic ideals and judicial review under the

Constitution, see Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to re-examine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to re-examine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly decided line of cases under *Lochner* v. *New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood* v. *Casey*, 505 U. S. 833, 861-862 (1992) (lead opinion). "Of course, it is embarrassing to confess a blunder; it may prove even more embarrassing to adhere to it." *United States* v. *Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to re-examine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson*, *supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, 505 U. S., at 855 (lead opinion).

The fact that *stare decisis* is not a "mechanical rule" is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, " 'the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' " *United States* v. *Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet*, *supra*, 285 U. S., at 408 (Brandeis, J., dissenting)).

B. Bullington as Precedent.

When deciding whether *stare decisis* should preserve a decision from re-examination, this Court "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood* v. *Casey*, 505 U. S. 833, 854 (1992) (lead opinion). This involves a look into the type of decision involved, the reliance interest it invokes, and what impact overruling the decision would have on the public's

perception of the rule of law. See part I A, *supra*. In light of these factors, *Bullington* v. *Missouri*, 451 U. S. 430 (1981) invokes minimal protection from *stare decisis*.

1. Contrary to precedent.

The strongest argument against *Bullington* is *Bullington*'s own treatment of precedent. The *Bullington* decision cannot be squared with this Court's previous decisions on the relationship between the Double Jeopardy Clause and sentencing. Decisions that do not respect precedent should not be preserved simply as a matter of *stare decisis*. If a decision improperly overrules or distinguishes a set of precedents, *stare decisis* must not prevent a return to the earlier, correct decisions.

The *Bullington* Court understood that there was tension between its decision and prior case law. It framed the issue as whether *Stroud* v. *United States*, 251 U. S. 15 (1919) applied to a modern capital sentencing system. See *Bullington*, *supra*, 451 U. S., at 432. The Court found that imposing double jeopardy protections on modern capital sentencing schemes did not conflict with *Stroud* or any other precedents. The earlier decisions, which refused to apply double jeopardy to sentences, dealt with sentencing proceedings that were less complicated and thus less trial-like than the Missouri death sentence procedure in *Bullington*. See *id.*, at 438-441. This distinction allowed the *Bullington* Court to impose double jeopardy protections on Missouri's capital sentencing system without formally having to overrule any precedents. See *id.*, at 446.

Bullington distinguished four precedents, *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), *North Carolina* v. *Pearce*, 395 U. S. 711 (1969),[4] and *Stroud* v. *United States*, *supra*. Each of these cases is at least substantially compromised by the *Bullington* decision. Although *Bullington* claimed that it did not overrule these decisions, the effect of *Bullington* was to make these cases shadows of their former selves.

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4. The companion case to *Pearce*, *Simpson* v. *Rice*, was overruled on other grounds in *Alabama* v. *Smith*, 490 U. S. 794, 802-803 (1989).

The first case distinguished, *Stroud*, provides perhaps the starkest conflict between *Bullington* and earlier precedent. Robert Stroud, the Birdman of Alcatraz,[5] was convicted of first-degree murder for killing a guard at Leavenworth prison and sentenced to death. His conviction was reversed, he was retried and again convicted of first-degree murder, but this time only sentenced to life. This conviction was also reversed and at his second retrial Stroud was again found guilty of first-degree murder and sentenced to death. *Stroud*, 251 U. S., at 16-17. Stroud challenged his last death sentence as being barred under double jeopardy by the life sentence imposed after the first retrial. *Id.*, at 17.

The *Stroud* Court held that sentencing was irrelevant to the Double Jeopardy Clause. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." *Id.*, at 18. The *Stroud* Court understood that jeopardy attached to acquittals from guilt, not sentences.[6] "The protection afforded by the Constitution is against a second trial for the same *offense*." *Ibid.* (emphasis added).

Bullington's attempt to distinguish *Stroud* is unsuccessful. It is true that *Stroud* and *Bullington* dealt with different sentencing procedures. *Stroud* involved a relatively uncomplicated system where the jury was simply asked whether defendant should not be given a death sentence, see *Bullington*, *supra*, 451 U. S., at 439, n. 11, while *Bullington* dealt with one of the death penalty proceedings that evolved after *Furman* v. *Georgia*, 408 U. S. 238 (1972). But this difference is irrelevant for the purpose of double jeopardy.

Double jeopardy is not imposed because a proceeding is relatively complicated, but because the proceeding involves the most important decision the law can make, whether a person is guilty of a crime. This is demonstrated in *United States* v. *Dixon*,

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5. See *Chaffin*, *supra*, 412 U. S., at 23.

6. Double jeopardy does place one limit on sentences. It prevents a person from being punished twice for the same crime. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither *Bullington* nor the present case involves this type of multiple punishment.

509 U. S. 688 (1993), where this Court held that the Double Jeopardy Clause applied to nonsummary criminal contempt proceedings. It did so not because of how the proceedings were conducted, but because of what was at stake at the contempt proceedings. "It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is '*a crime in the ordinary sense*.' " *Id.*, at 696 (emphasis added) (quoting *Bloom* v. *Illinois*, 391 U. S. 194, 201 (1968)). As other constitutional protections applied to nonsummary contempt proceedings "just as they do in other criminal prosecutions," there was no reason not to apply the Double Jeopardy Clause. *Ibid.*

In using the trial-like nature of Missouri's death sentence procedure to impose double jeopardy protections, *Bullington* placed the cart before the horse. Whether a proceeding is like a trial does not determine what constitutional rights it invokes; what matters is what is at stake. Thus in *In re Oliver*, 333 U. S. 257 (1948), this Court held that defendant had a right to a public trial in a contempt proceeding held by a "one-man grand jury." The grand jury could hold a witness in contempt without affording the witness anything resembling a trial. *Id.*, at 262. In spite of the fact that this proceeding in no way resembled a trial, the right to public trial was imposed because of the serious consequences of a contempt finding.

> "Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, *but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both*." *Id.*, at 265 (emphasis added).

Eventually, this Court added so many rights to the nonsummary contempt proceeding that it now resembles a trial. See *Dixon*, *supra*, 509 U. S., at 696. But these were imposed not because of the complexity of the proceedings, but because of the consequences of a contempt finding. This point is reiterated in *Hudson* v. *United States*, 522 U. S. ___, 139 L. Ed. 2d 450, 456-

457, 118 S. Ct. 488, 491 (1997) where this Court found that an assessment made by the Comptroller of the Currency against bank executives did not invoke the double jeopardy ban against subsequent prosecution for the acts that led to the assessment. While the assessment was made pursuant to an administrative proceeding, this Court only examined the nature of the sanction and the intent of Congress in promulgating the sanction, not the process used to invoke it. See *id.*, at 459, 118 S. Ct., at 493.

Bullington also implied that the fact that the death penalty was involved made the sentencing hearing more like a trial. See 451 U. S., at 445. This placed *Bullington* in direct conflict with *Stroud*. The *Stroud* juries had to make the same decision as the juries in *Bullington*, whether defendant should be sentenced to death or imprisonment. The importance of this decision did not, however, influence the *Stroud* Court. The decision to inflict the death penalty was still no more than a sentencing question. As it did not go to the question of guilt, double jeopardy was irrelevant. See *Stroud*, 251 U. S., at 18.

The law of capital punishment did change between *Stroud* and *Bullington*. Starting with *Furman* v. *Georgia*, *supra*, this Court has invoked the Eighth Amendment to make radical changes in how, when, and against whom the death penalty is imposed. But *Bullington* is not an Eighth Amendment case. Death may be different under the Eighth Amendment, but until the *Bullington* Court chose to bypass *Stroud*, death was not different for the purposes of the Double Jeopardy Clause.

North Carolina v. *Pearce*, 395 U. S. 711 (1969) showed that the lessons of *Stroud* were undiminished after 50 years. In *Pearce*, a noncapital case, defendant won a reversal of his first conviction, and was given a higher sentence upon being convicted at retrial. *Id.*, at 713. The fact that the first sentence was shorter did not invoke double jeopardy. "Long-established constitutional doctrine makes clear that, beyond the requirement already discussed,[7] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." *Id.*, at 719. This decision was the logical extension of the

7. That time served under the first sentence must be credited against whatever sentence is imposed after retrial. *Id.*, at 718-719.

government's power to retry defendant following most reversals. "[A]t least since 1919, when *Stroud* v. *United States*, 251 U. S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, *to impose whatever sentence may be legally authorized*, whether or not it is greater than the sentence imposed after the first conviction." *Pearce*, 395 U. S., at 720 (emphasis added).

Bullington sought to distinguish *Pearce* on the ground that it did not involve a separate sentencing proceeding. *Bullington*, *supra*, 451 U. S., at 439. Because the sentencer in *Pearce* had a wide range of potential sentences and no standards for guidance, this decision could not be compared to the one in *Bullington*. *Ibid.* Yet *Pearce* did not turn on how the sentence was reached. Instead, it recognized that punishment and guilt are two separate issues, and only the latter invokes the Double Jeopardy Clause. See 395 U. S., at 720.

Chaffin v. *Stynchcombe*, 412 U. S. 17 (1973) received the same treatment from the *Bullington* Court as *Pearce*. *Chaffin* held that the underlying rationale of *Pearce* applies to jury sentencing as well as judge sentencing. *Id.*, at 18. *Chaffin* reaffirmed both *Stroud* and *Pearce*, declining any invitation to overrule them. See *id.*, at 24. *Bullington*'s effort to distinguish *Chaffin* by the nature of the proceeding was as unsuccessful as its effort to distinguish *Pearce*.

The final case distinguished by *Bullington*, *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), shows how far *Bullington* had to stretch to avoid precedent. DiFrancesco was convicted in federal court of racketeering offenses, and had his sentence enhanced as a dangerous special offender. *Id.*, at 122. The United States appealed the dangerous offender sentence, claiming that the trial court abused its discretion in sentencing defendant to only one extra year for being a dangerous offender. See *id.*, at 123. The Court of Appeals dismissed the government's appeal on double jeopardy grounds. *Ibid.*

This Court held that the government's appeal of a sentence was not barred by double jeopardy. Appeal of a sentence could violate double jeopardy only if the initial sentence was viewed as an acquittal of any higher sentence. *Id.*, at 133. Neither history nor precedent could support this proposition. Historically,

pronouncement of sentence never carried the same finality that an acquittal did. *Ibid.* This was important because the "Double Jeopardy Clause was drafted with the common-law protections in mind." *Id.*, at 134. Allowing the government to appeal a sentence was a natural application of *Stroud*, *Pearce*, and *Chaffin*. These cases "clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." See *id.*, at 134-135. Any other result would overrule *Pearce*. See *id.*, at 135-136, n. 14.

The sentencing proceeding in *DiFrancesco* had all the accoutrements of a trial. The dangerous special offender finding could be made only after a hearing in which defendant had a right to counsel, compulsory process, and cross-examination. The enhancement was imposed only if the trial court found by a preponderance of the evidence that defendant was a dangerous special offender. *Id.*, at 118-119, n. 1.

In spite of the great similarity between this proceeding and the one in *Bullington*, the *Bullington* Court felt that it could distinguish *DiFrancesco*. First it noted that *DiFrancesco* involved only an "appellate review of a sentence 'on the record of the sentencing court,' [18 U. S. C.] § 3576, not a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts." *Bullington*, *supra*, 451 U. S., at 440. Yet *DiFrancesco* itself flatly rejected that very distinction. "While *Pearce* dealt with the imposition of a new sentence after retrial rather than, as [in *DiFrancesco*], after appeal, *that difference is no more than a 'conceptual nicety.'* " *DiFrancesco*, 449 U. S., at 135-136 (emphasis added). The issue in *DiFrancesco* was "whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *Id.*, at 132. The Court understood that there were "*fundamental distinctions* between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *Id.*, at 133 (emphasis added). This, not the particular procedures of the sentencing hearing, formed the basis of the holding in *DiFrancesco*.

Bullington's distinction cannot be squared with the rest of double jeopardy law. The government cannot appeal after an acquittal. *United States* v. *Wilson*, 420 U. S. 332, 352 (1975). If

an appellate court reversed an acquittal and imposed a conviction on its own accord, it would be no less a violation of double jeopardy than if the government could retry an acquittal. See *Kepner* v. *United States*, 195 U. S. 100, 133 (1904). Yet *Bullington*, in its effort to avoid overruling *DiFrancesco*, would turn this difference into a distinction of constitutional significance. In so doing, it adds *Wilson* and *Kepner* to the list of precedents it flouts.

Bullington next tried to distinguish *DiFrancesco* on the ground that *DiFrancesco* involved a sentencing scheme where the judge had a far broader choice of possible sentences than the one in *Bullington*. *Bullington*, *supra*, 451 U. S., at 440-441. Once again, this is a distinction without any constitutional difference. *DiFrancesco* did not turn on the fact that the sentencer could impose any sentence not to exceed 25 years, a fact it only mentions in passing. See *DiFrancesco*, *supra*, 449 U. S., at 119, n. 1. The *DiFrancesco* Court relied in part upon *Stroud*, where, as in *Bullington*, the sentencing jury only had two options, life imprisonment or death. See *id.*, at 135 (citing *Stroud*); *Stroud*, *supra*, 251 U. S., at 17-18.

Finally, the *Bullington* Court attempted to distinguish the trial-like nature of the special offender hearing in *DiFrancesco* on the ground that it only required the prosecution to prove its case by a preponderance of the evidence, while the sentencing system in *Bullington* required proof beyond a reasonable doubt. 451 U. S., at 441. This distinction places too much emphasis on what is an anomaly of Missouri's capital sentencing scheme.

Many state capital sentencing schemes have a reasonable doubt standard for the eligibility finding but not for the final sentencing decision. See, *e.g.*, *People* v. *Frierson*, 25 Cal. 3d 142, 180, 599 P. 2d 587, 609 (1979) (upholding California's 1977 death penalty law). This Court has upheld such systems. See, *e.g.*, *Pulley* v. *Harris*, 465 U. S. 37, 54 (1984) (same). If *Bullington* distinguished *DiFrancesco* because Missouri imposed the reasonable doubt standard on the final sentencing decision, then *Bullington* is based upon a procedural anomaly of Missouri's death penalty law. If the *Bullington* Court was referring to the fact that Missouri imposes the reasonable doubt standard for eligibility, then this decision is much narrower than commonly thought; it would not preclude resentencing a defendant to death if the first

jury found him eligible but sentenced him to life. It would also be much more in conflict with *Poland* v. *Arizona*, 476 U. S. 147, 155-156 (1986) which declined to extend *Bullington* to eligibility findings. This would further weaken *Bullington* as precedent. See part I B 3, *post*, at 16-18.

DiFrancesco did not turn on the standard of proof. It was a continuation of cases starting with *Stroud* that jeopardy does not attach to the decision of the sentencer. The burden of proof for imposing a sentence was irrelevant to double jeopardy analysis until *Bullington*. If *stare decisis* is to have any authority, cases must be distinguished only upon meaningful grounds. Any case can be "distinguished" from a prior decision. There will always be some difference in the procedural posture or factual setting that will support a claim that the cases are different. If trivial differences are enough to distinguish cases, then *stare decisis* will have no meaning.

> "[T]o view stare decisis as requiring identical decision only upon identical material facts as they are seen by the nonprecedent court . . . is to impose little constraint by the doctrine. Stare decisis, so loosely understood, leaves the nonprecedent court free to avoid the bonds of preceding cases by recasting their material facts *or assigning reasons to the prior decisions quite distinct from those originally assigned*. With this leeway, courts will seldom be faced with the necessity for explicit overruling." Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 9, n. 37 (1979) (emphasis added).

Stroud, *Pearce*, *Chaffin*, and *DiFrancesco* all stand for one principle—that double jeopardy does not prevent the imposition at a later proceeding of a higher sentence than had been imposed at an earlier proceeding. In *Bullington*, this Court said that there were times when double jeopardy prevents imposing a higher sentence at a later hearing. *Bullington* and *DiFrancesco* thus stand as a prime example of this Court rendering mutually inconsistent decisions. See Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 811, n. 25 (1982). *Stare decisis* requires that this inconsistency be resolved.

This Court must resolve conflicts between its precedents. If a decision contradicts the principles of an earlier case, confusion

in the lower courts is inevitable. If two decisions are in conflict, *stare decisis* does not prevent a return to an earlier correct decision. See *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

> "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, 'special justification' exists to depart from the recently decided case." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 231 (1995) (opinion of O'Connor, J.).

Bullington's cavalier avoidance of prior authority is the type of situational decision that can only undermine respect for *stare decisis* and this Court.

2. Type of decision.

The problems caused by *Bullington* are particularly severe because of the type of decision it is. *Bullington* is a constitutional decision, and unless the Constitution is amended, overruling is the only other method of correcting its errors. Thus, constitutional decisions are traditionally afforded less *stare decisis* protection than statutory decisions, which are always susceptible to congressional action.

Some constitutional decisions warrant more *stare decisis* protection than others. These involve particularly divisive national controversies that this Court's decision has substantially resolved. See *Planned Parenthood* v. *Casey*, 505 U. S. 833, 867 (1992). *Bullington* is not such a case. While it is important, the Double Jeopardy Clause has not and is not likely to divide the country. It involves the sort of technical issue that the lay public is unlikely to understand well, if at all. Cf. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 737 (1949). Double jeopardy is a very complicated part of the law. See *DiFrancesco*, *supra*, 449 U. S., at 127. Therefore, this Court has periodically reversed course and overruled prior double jeopardy decisions. See, *e.g.*, *United States* v. *Scott*, 437 U. S. 82, 86-87 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)); *Burks* v. *United States*, 437 U. S.

1, 6-10, 18 (1978) (overruling several prior cases); *United States* v. *Dixon*, 509 U. S. 688, 704 (1993) (overruling *Grady* v. *Corbin*, 495 U. S. 508 (1990)); *Hudson* v. *United States*, 522 U. S. ___, 139 L. Ed. 2d 450, 460-461, 118 S. Ct. 488, 494-495 (1997) (overruling *United States* v. *Halper*, 490 U. S. 435 (1989)). *Stare decisis* is at its weakest in this most technical part of the law.

3. Poland v. Arizona.

Bullington's potential for confusion is also demonstrated by this Court's retreat from it in *Poland* v. *Arizona*, 476 U. S. 147 (1986). In *Poland*, a capital case, the trial court erroneously held that a murder committed during an armed robbery could not support a murder for pecuniary gain finding. It nonetheless sentenced the defendants to death because it found that the murders were "especially heinous, cruel [or] depraved." *Id.*, at 149. The Arizona Supreme Court reversed the guilty verdict, found that there was insufficient evidence to support the especially heinous circumstance, and noted that murder for pecuniary gain was supported by armed robbery murder. On retrial, the defendants were again convicted on first-degree murder and again sentenced to death on the pecuniary gain, especially heinous grounds. *Id.*, at 149-150. The Arizona Supreme Court upheld the death sentences for both defendants on the pecuniary gain grounds. *Id.*, at 151.

This Court upheld the sentences, finding no conflict with *Bullington*. The *Poland* Court held that applying double jeopardy to individual aggravating circumstances would require viewing "the capital sentencing hearing as a set of minitrials . . . . " *Id.*, at 156. This would push *Bullington*'s trial analogy "past the breaking point" and thus was unacceptable. *Ibid.*

While the decision not to extend *Bullington* was proper, it is very difficult to harmonize *Poland* with the rationale of *Bullington*. *Bullington* held that the decision not to impose death constituted an acquittal because the Missouri sentencing procedure that decided this issue was so like a trial. See *Bullington*, *supra*, 451 U. S., at 438, 445. Using the same reasoning, this Court applied double jeopardy to Arizona's capital sentencing hearing. See *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). In Arizona, the decision on an individual aggravating circumstance

is made at this same trial-like capital sentencing hearing. See *id.*, at 210. Like the penalty question in *Bullington*, in Arizona "[t]he usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt." *Ibid.*

The *Poland* Court ignored this symmetry and refused to apply *Bullington*, asserting that its case was different because there had never been a verdict of life imprisonment. See *Poland*, *supra*, 476 U. S., at 154. This flatly contradicts traditional double jeopardy principles as applied to guilty verdicts. Once an appellate court finds that there was insufficient evidence to support a conviction, double jeopardy prevents retrial. *Burks* v. *United States*, 437 U. S. 1, 16 (1978). Furthermore, an erroneous acquittal is also protected under double jeopardy. *Sanabria* v. *United States*, 437 U. S. 54, 68-69 (1978). Therefore, if Arizona's death penalty procedure was considered a trial for double jeopardy purposes, see *Rumsey*, 467 U. S., at 205 (applying *Bullington*), the failure to find the aggravating circumstance at the first penalty "trial" should have operated as an acquittal.

Poland represents a headlong retreat from the trial metaphor of *Bullington*. "[W]hen confronted in *Poland* with the logical conclusion of the course it set in *Bullington*, the Court contents itself with a statement which in essence says simply: 'We will not go that far.' " Bennett, Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor, 19 N.M.L. Rev. 451, 465 (1989). When this Court backs off from a significant portion of a precedent, it is strong evidence that the precedent is unworkable and should be re-examined. Cf. *United States* v. *Dixon*, 509 U. S. 688, 709 (1993) (decision in *United States* v. *Felix*, 503 U. S. 378 (1992), creating large exception to *Grady* v. *Corbin*, 495 U. S. 508 (1990), demonstrated the need to overrule *Grady*); *Hudson* v. *United States*, *supra*, 139 L. Ed. 2d 450, 451, 118 S. Ct. 488, 494-495 (1997) (decisions in *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767 (1994) and *United States* v. *Ursery*, 518 U. S. ___, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996) undercut *United States* v. *Halper*, 490 U. S. 435 (1989)). After *Poland*, *Bullington* is an anomaly in the law, contradicted by cases decided before and after it.

When developments in the law rob a decision of its authority, it is time to re-examine the old decision. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989). When a case contradicts "an 'unbroken line of decisions' . . . and has produced 'confusion,' " it is time to re-examine the precedent. *Dixon*, *supra*, 509 U. S., at 711-712. Therefore, a re-examination of *Bullington* is in order.

III. *Bullington* should be overruled.

A. Wrongly Decided.

When deciding whether a practice should invoke the Double Jeopardy Clause, this Court has looked to the historical treatment of the practice, this Court's precedents, and the underlying purpose of the Double Jeopardy Clause. See *United States* v. *DiFrancesco*, 449 U. S. 117, 132 (1980). Viewed through this analysis, sentencing, regardless of the procedural form it takes, cannot invoke the Double Jeopardy Clause's protection against retrial. *Bullington* failed to apply this analysis to the issue before it, and therefore was improperly decided.

1. History.

History is the most important tool for interpreting the Double Jeopardy Clause. Double jeopardy is amongst our oldest legal principles, with roots as far back as Greek and Roman law. See J. Sigler, Double Jeopardy 2 (1969). While double jeopardy had an initially rocky start under the common law, Coke and Blackstone enshrined it as a part of England's legal heritage. See *id.*, at 16-20. The Founders recognized the importance of this heritage and used Blackstone's definition as the basis of the Double Jeopardy Clause. See *United States* v. *Wilson*, 420 U. S. 332, 340-342 (1975). "The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind." *DiFrancesco*, *supra*, 449 U. S., at 134.

At the common law, the prohibition took the form of three pleas: *autre fois acquit*, former acquittal; *autre fois convict*, former conviction; and *autre fois attaint*, former attainder. See 4 W. Blackstone, Commentaries 329-330 (1st ed. 1769). The first

two interests are protected under the Double Jeopardy Clause, while former attainder is now obsolete. See Sigler, *supra*, at 18. The sentencing practices in *Bullington* and the present case invoke neither former acquittal nor former conviction.

Historically, neither of these protections were invoked by the pronouncement of sentence. The only limit on sentencing was the prohibition against punishing someone again after they had already completed the imposed sentence, or imposing a sentence greater than that allowed by law. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither of these prohibitions was invoked in *Bullington* nor the present case. This is the furthest that double jeopardy extends into sentencing.

"Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. The common law writs of *autre fois acquit* and *autre fois convict* were protections against retrial." *DiFrancesco*, *supra*, 449 U. S., at 133. As imprisonment became the more common form of punishment, this distinction became more important. Thus a trial court could increase a sentence without violating double jeopardy, so long as it was done during the same term of the court as the initial sentence. See *Lange*, *supra*, 18 Wall., at 167. Similarly, it was "established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least . . . so long as he has not yet begun to serve that sentence." *DiFrancesco*, 449 U. S., at 134.

The Double Jeopardy Clause states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. This language was adopted to prevent the retrial of an acquitted defendant, while at the same time allowing a defendant to seek a new trial on appeal from the conviction. See *Wilson*, *supra*, 420 U. S., at 341. Thus, allowing a retrial after defendant's conviction is reversed,[8] "is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo*, 377 U. S. 463, 465 (1964). This principle is the basis for the modern distinction between sentencing and conviction. "[I]t rests ultimately upon the premise that the original

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8. Except when the reversal is for insufficient evidence. See *Burks* v. *United States*, 437 U. S. 1, 16 (1978).

conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 395 U. S. 711, 721 (1969). As the slate has been "wiped clean," any legal sentence may be imposed upon retrial.[9]

> "But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate *has* been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States* v. *Ball*, *supra*, and upon the unbroken line of decisions that have followed that principle for almost 75 years." *Id.*, at 721 (emphasis in original).

This principle is derived from the original intent behind the particular language of the Double Jeopardy Clause. The Clause was adopted in its particular form so that defendant could be tried and sentenced again after obtaining a reversal. Logic compels us to recognize, as the *Pearce* Court did, that if the slate is clean for the conviction, it must be so for the sentence.

The *Bullington* Court did not attempt any in-depth historical analysis of its position. While it made great efforts to distinguish the many cases its holding conflicted with, it ignored history. This failure to deal with history now warrants reversal.

> "We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation." *Ex parte Siebold*, 100 U. S. 371, 393 (1880).

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9. Provided that any judge-imposed sentence is not vindictively higher than the original sentence and thus a violation of due process. See *id.*, at 725-726.

It is time to bring the Double Jeopardy Clause back from *Bullington*'s "depth of speculation."

2. Precedent.

In addition to ignoring history, *Bullington* also has no support in precedent. Its contradiction of prior decisions, primarily *United States* v. *DiFrancesco*, *supra*, *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), *North Carolina* v. *Pearce*, *supra*, and *Stroud* v. *United States*, 251 U. S. 15 (1919), and its contradiction by *Poland* v. *Arizona*, 476 U. S. 147 (1986) are discussed extensively earlier in this brief. See part I B 1 & 3, *supra*, at 7-15, 16-18. In addition to weakening *stare decisis* support for the case, the fact that *Bullington* contradicts prior decisions and is contradicted by subsequent cases also provides a good reason for overruling *Bullington*. See *United States* v. *Dixon*, 509 U. S. 688 (1993).

3. Contrary to principles.

In addition to ignoring history and precedent, *Bullington* contradicts the general principles that form the foundation of the Double Jeopardy Clause. In its effort to distinguish *North Carolina* v. *Pearce*, *supra*, the *Bullington* Court called forth this Court's classic statement of the principles of the Double Jeopardy Clause.

> " 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " *Bullington*, *supra*, 451 U. S., at 445 (quoting *Green* v. *United States*, 355 U. S. 184, 187-188 (1957)).

Green recognizes two key protections are provided by the Double Jeopardy Clause: protecting the innocent from being convicted, and protecting the defendant from government harassment through repeated litigation. Neither of these principles were violated by the state courts in *Bullington* or the present case.

Of these two goals, protecting the innocent is the most important. It is a fundamental principle of our criminal justice system that we must make all reasonable efforts to avoid convicting the innocent. Thus, it is better to let ten guilty persons go free than to convict one innocent person. See 4 W. Blackstone, Commentaries 352 (1st ed. 1769). Sentencing never comes into conflict with this principle. Before a defendant is sentenced, he must first be found guilty.

The second principle of *Green*, protecting defendants from harassment, is related to protecting the innocent. In addition to running the risk that an innocent person may be convicted, the threat of retrial may coerce an innocent person into pleading guilty to a lesser charge. This is perhaps the most important part of double jeopardy. The ability to use its resources to coerce any citizen to do its will is an essential tool of the totalitarian state. Thus double jeopardy was foreign to the criminal law of Nazi Germany, Fascist Italy, and the pre-Khrushchev Soviet Union. See Sigler, *supra*, at 145-146.

As it relates to innocence, the ability of the state to wear down individuals is not invoked by sentencing. Until a person is found guilty, sentencing is irrelevant.

The Double Jeopardy Clause protects more than the innocent. It will even preserve an apparently erroneous acquittal. See *Green* v. *United States*, 355 U. S. 184, 188 (1957). This serves double jeopardy's general protection against harassment. This interest is not served by treating a lesser sentence as an acquittal of a greater one.

Green fought to protect all acquitted defendants from undergoing additional "embarrassment, expense and ordeal." See *id.*, at 187. A new sentencing hearing cannot cause a defendant any further embarrassment. He has already been convicted of a crime; the sentencing hearing simply determines his just deserts. Nor should the extra expense of the sentencing hearing justify double jeopardy protection. A resentenced defendant has already been through at least a trial, a sentencing hearing, and a successful appeal before being resentenced. Many will also have been through a second trial at their own request. See, *e.g.*, *Bullington*, *supra*, 451 U. S., at 436. Given the large proportion of defendants

for whom the state pays defense costs, the additional expense of a second sentencing hearing is usually *de minimis*.

A new sentencing hearing is not a particularly harsh ordeal for defendant. He has already been through the ordeal of being convicted and is about to experience the ordeal of punishment. The sentencing hearing is simply the means of determining the extent of his future punishment. The fact that a higher sentence is imposed at the second hearing does not change this calculus. "The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 25 (1973).

Green also sought to protect defendants from the continued anxiety and insecurity caused by retrial. 355 U. S., at 187. Whatever extra anxiety and insecurity is caused by a new sentencing hearing is not of constitutional magnitude. The defendant has already been found guilty. He knows he is going to be punished; the only issue is how much. As *Chaffin* recognized, the possibility of a higher sentence after retrial is a legitimate part of retrial. 412 U. S., at 25.

Bullington implies that resentencing was a particular cause of anxiety and ordeal when the death penalty was involved. *Bullington*, *supra*, 451 U. S., at 445. This is one of the most dangerous arguments in *Bullington*. The notion of treating capital cases differently has largely been confined to the Eighth Amendment, spawning a complicated body of law. See part I, *supra*. Double jeopardy is complicated enough as it is. See *United States* v. *DiFrancesco*, 449 U. S. 117, 126-127 (1980) (citing extensive and often inconsistent case law). There is no reason to further complicate it by importing Eighth Amendment concepts.

While the sentencer's choice between a life sentence and death is important, this decision must be viewed in this context. A defendant facing this decision has already been convicted of a capital crime. A death sentence, so long as it is imposed in accordance with the Eighth Amendment, is a lawful sentence and should be treated the same as any other sentence. See *Bullington*, *supra*, 451 U. S., at 451-452 (Powell, J., dissenting).

B. Confusion.

In addition to being contrary to precedent and bad policy, *Bullington* v. *Missouri*, 451 U. S. 430 (1981) is also confusing. Its standard, "the hallmarks of the trial on guilt or innocence," confuses the lower courts, spawning a "wide variety of novel double jeopardy claims." *Id.*, at 439. Cf. *Hudson* v. *United States*, 522 U. S. ___, 139 L. Ed. 2d 450, 458, 118 S. Ct. 488, 493 (1997). *Bullington*'s confusing, ill-considered standard is yet one more reason to overturn the decision. See, *e.g.*, *Seminole Tribe of Florida* v. *Florida*, 517 U. S. 44, 63-64 (1996); *United States* v. *Dixon*, 509 U. S. 688, 711-712 (1993).

The problem with administering *Bullington*'s "hallmarks" standard is in the many subtle variations of sentencing procedures presented to the courts. Some courts have justified extending *Bullington* on the basis of only one procedure benefitting defendant, such as applying the reasonable doubt standard to the predicate facts for the sentence enhancement. See, *e.g.*, *Durosko* v. *Lewis*, 882 F. 2d 357, 359 (CA9 1989); *Briggs* v. *Procunier*, 764 F. 2d 368, 371 (CA5 1985). Other jurisdictions take a more comprehensive approach, requiring that all three of the factors found in *Bullington* must be present to be protected under double jeopardy. See *People* v. *Levin*, 623 N. E. 2d 317 (Ill. 1993) (right to present evidence and cross-examine, reasonable doubt standard, and only two sentencing alternatives).

Other factors may also influence this already complex decision. In *People* v. *Sailor*, 480 N. E. 2d 701, 705-710 (N.Y. 1985), New York's high court used the context of a sentencing statute to distinguish it from *Bullington*. The death penalty statutes in *Bullington* and *Arizona* v. *Rumsey*, 467 U. S. 203 (1984) were "part and parcel of the substantive offense of capital murder [citations] in which the existence of certain aggravating circumstances elevate the crime charged from murder punishable by life imprisonment to murder punishable by death." *Sailor*, 480 N. E. 2d, at 707. New York's persistent felony offender statutes, however, "are concerned solely with a defendant's prior criminal record, and, in the case of a persistent felon, 'factors in the defendant's background and prior criminal conduct' " deemed relevant by the court. *Ibid.* The persistent felony statutes thus did not aggravate "the substantive offense elevating it to a higher class

. . . ." *Id.*, at 708. This structural difference, along with the difference between imposing death and life imprisonment, allowed the Court of Appeals to distinguish *Bullington*. *Ibid.* Unfortunately, the *Sailor* Court's structural analysis was wrong. "Aggravating circumstances are not separate penalties or offenses . . . ." *Poland* v. *Arizona*, 476 U. S. 147, 156 (1986). An aggravating circumstance is therefore not an element of the crime of capital murder. *Walton* v. *Arizona*, 497 U. S. 639, 649 (1990). *Sailor* demonstrates that *Bullington*'s unnatural mix of double jeopardy and sentencing procedures leads to confusion.

Although improperly executed, *Sailor*'s holding that the structure of a sentencing statute is relevant to *Bullington*'s application is analytically sound. Sentencing schemes can and do have complex structures. Some may be largely divorced from the underlying offense, such as habitual offender statutes. Others will bear a much closer factual relationship to the underlying offense such as weapons enhancements. See, *e.g.*, *Bailey* v. *United States*, 516 U. S. 137 (1995) (interpreting 18 U. S. C. § 924(c)(1)). The relationship of the sentence to the underlying facts of the crime may thus also influence the *Bullington* analysis. See *Carpenter* v. *Chapleau*, 72 F. 3d 1269, 1274 (CA6 1996). This intricate, convoluted, and too often incorrect analysis reinforces the confusion in the lower courts' application of *Bullington*.

Bullington has added one final layer of complexity to the Double Jeopardy Clause. Although the decision was not based on any "death is different" agenda, see part I, *supra*, the gravity of the death versus life imprisonment decision did influence the Court's analysis. See *Bullington*, 451 U. S., at 445. This distinction may not be confined to the difference between death and life. The existence of a particular enhancement or other sentencing fact can greatly increase a prison sentence. For example, in California, grand theft can be punished as a felony with a one-year prison sentence. See Cal. Penal Code § 489(b) (West Supp. 1998). A person who is convicted of grand theft with one prior serious felony conviction is subject to a three-year sentence. See § 667(e)(1) (doubling base term); § 667.5(b) (one-year enhancement for a prior prison term). If the People prove the existence of a second prior serious felony conviction, then the base sentence

jumps to 25-years-to-life, see§ 667(e)(2), plus an extra two years for the two prior prison terms. § 667.5(b).

The existence of one prior felony, which raises the punishment for grand theft to that for noncapital first-degree murder, see § 190(a) (West 1988), may thus cause enough anxiety in a defendant to trigger *Bullington*'s protection. If it does, then the *Bullington* rule will force courts to evaluate the vast, subtle variations in prison sentences presented by state and federal sentencing schemes. If the defendant in the present case had a second prior serious felony allegation proven against him, his sentence would be increased from 11 years, see *People* v. *Monge*, 16 Cal. 4th 826, 831, 941 P. 2d 1121, 1124 (1997) (plurality), to 27-to-life. See Cal. Penal Code § 667.5(b). This less dramatic enhancement than the one demonstrated in the hypothetical above may not be enough to trigger *Bullington*, leaving the Double Jeopardy Clause's application dependent upon the particular defendant being sentenced under the same statute.

Bullington is a mess. This Court now has the opportunity to clean it up quickly and efficiently by returning to the simple standard of *Stroud*, *Pearce*, and *DiFrancesco* that sentencing is not subject to the Double Jeopardy Clause.

C. Punishing Good Deeds.

In addition to being contrary to the law, *Bullington* also sets a disturbing example to the states and Congress. An important reason for its decision to extend the Double Jeopardy Clause to Missouri's capital sentencing scheme was the fact that it used the reasonable doubt standard. *Bullington* v. *Missouri*, 451 U. S. 430, 441 (1981). Yet there is no constitutional requirement that sentencing findings be proved beyond a reasonable doubt. See part I B 1, *supra*, at 13-14. In other contexts, this Court ha. explicitly rejected the assertion that the sentencing decision requires all the protections of the guilt determination. See *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990) (jury trial). *Bullington*, by imposing greater constitutional burdens on a state procedure because it is more helpful to defendant, encourages states to provide the accused with only the minimum procedural protection. The chilling effect this has on state criminal procedure warrants overruling *Bullington*.

Courts have responded to *Bullington* by punishing states for providing defendants with extra rights at sentencing. Those jurisdictions which have applied *Bullington* to noncapital cases have relied primarily upon the rights accorded defendants in the relevant sentencing proceedings. See, *e.g.*, *Durosko* v. *Lewis*, 882 F. 2d 357, 359 (CA9 1989) (reasonable doubt); *Nelson* v. *Lockhart*, 828 F. 2d 446, 447-448 (CA8 1987), rev'd on other grounds, *Lockhart* v. *Nelson*, 488 U. S. 33 (1988) (both sides present evidence, cross-examination, reasonable doubt); *Briggs* v. *Procunier*, 764 F. 2d 368, 371 (CA5 1985) (reasonable doubt); *State* v. *Hennings*, 670 P. 2d 256, 261-262 (Wash. 1983) (reasonable doubt, bifurcated proceedings, limited discretion); *People* v. *Quinata*, 634 P. 2d 413, 419 (Colo. 1981) (reasonable doubt, bifurcated proceedings, separate verdict). Similarly some jurisdictions have held *Bullington* applicable to noncapital cases, but declined to apply it to specific sentencing processes that were insufficiently beneficial to defendant. Thus in *People* v. *Levin*, 623 N. E. 2d 317, 324 (Ill. 1993), the court noted that while the capital sentencing provision in *Bullington* contained "many of the due process protections afforded a defendant at trial on the issue of guilt," Illinois habitual offender procedure was distinguishable because it was less beneficial to defendants. "These same evidentiary and procedural safeguards, however, are not present . . . ." *Ibid.* Other courts have reached similar conclusions under similar analysis. See, *e.g.*, *Carpenter* v. *Chapleau*, 72 F. 3d 1269, 1273-1274 (CA6 1996); *Woodall* v. *United States*, 72 F. 3d 77, 79-80 (CA8 1995); *Wilmer* v. *Johnson*, 30 F. 3d 451, 456 (CA3 1994); *State* v. *Cobb*, 875 S. W. 2d 533, 535 (Mo. 1994); *People* v. *Sailor*, 480 N. E. 2d 701, 703-710 (N.Y. 1985).

The Double Jeopardy Clause does not protect in measured steps. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced . . . ." *Burks* v. *United States*, 437 U. S. 1, 11, n. 6 (1978). This absolutism will in turn give appellate courts reason to review the factual basis of a sentence less strictly. "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *United States* v. *Tateo*, 377 U. S.

463, 466 (1964). The same reasoning applies to the sentencing hearing.

Bullington's continued existence will also cause states to withdraw protections from defendants in order to avoid the Double Jeopardy Clause. See, *e.g.*, *Swisher* v. *Brady*, 438 U. S. 204, 210-212 (1978) (state court changing juvenile court rules in response to district court ruling that state's juvenile justice system violated double jeopardy). Putting more structure into sentencing, making it more trial-like, may well be to defendants' benefit. Such structure would make them less subject to individual judges' whims and prejudices. Yet *Bullington* latches on to the trial-like aspect of the sentencing proceeding to extend the reach of the Double Jeopardy Clause.

Unless *Bullington* is removed, states will have every reason to weaken defendant's protections in order to avoid additional constitutional burdens. If the state can restructure a proceeding so that there is no chance of a double jeopardy violation, but the ultimate impact on defendant is the same or worse than had the proceeding remained unchanged, there is no reason to extend the Double Jeopardy Clause to the original proceeding. See *United States* v. *DiFrancesco*, 449 U. S. 117, 142 (1980). Substance, not form, is supposed to govern the Double Jeopardy Clause. See *ibid.*

Bullington is not the only example of this Court creating perverse incentives contrary to the interests of those it seeks to protect. Beginning with *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court examined prison regulations to determine whether the regulations created constitutional protected liberty interests. See *Sandin* v. *Conner*, 515 U. S. 472, 477-482 (1995) (reviewing cases). These cases developed into an examination of how much discretion state officials had to withdraw state-created benefits from prisoners: the more discretion, the less likely that the prisoner had a constitutional interest in the benefit. See *id.*, at 479-480.

This Court began to recognize the consequences of such perverse incentives in *Hewitt* v. *Helms*, 459 U. S. 460 (1983). "It would be ironic to hold that when a State embarks on such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal

courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* parsed the language of the relevant statute, and based on the choice of words found "that the State has created a protected liberty interest." *Id.*, at 472. After *Hewitt*, close examination of prison regulations for the extent of the discretion given to prison officials became the norm. See *Conner*, *supra*, 515 U. S., at 481 (discussing *Olim* v. *Wakinekona*, 461 U. S. 238 (1983) and *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454 (1989)).

The irrationality of these cases was finally checked in *Conner*. "The approach embraced by *Hewitt* discourages this desirable development: States may avoid the creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Conner*, 515 U. S., at 482. The perversity of such incentives helped justify *Conner*'s decision to abandon the methodology embodied in *Hewitt*. See *id.*, at 483, n. 5. *Conner* shows the way out of *Bullington*'s mess. Decisions or methodology that deters government from voluntarily granting more rights to individuals cannot be tolerated.

Amicus submits that *Bullington* should be overruled. Any attempt to salvage *Bullington* "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). This prior doctrine was first enunciated in *Stroud* v. *United States*, 251 U. S. 15 (1919), and most recently affirmed in *United States* v. *DiFrancesco*, 449 U. S. 117 (1980). The prior, better rule is simple. A sentencing decision does not have the finality of an acquittal; the Double Jeopardy Clause does not apply.

CONCLUSION

The decision of the California Supreme Court should be affirmed.

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Respectfully submitted,

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